No. 92-846

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IN THE

Supreme Court of the United States

October Term, 1992

MARSHALL MARTIN, JR., On Behalf of Himself and all other Employees of the Ohio Turnpike Commission similarly situated, *et al.*,
Petitioners,

vs.

OHIO TURNPIKE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the U.S. Court of Appeals for the Sixth Circuit applied the proper legal standard under Rule 56 of the Federal Rules of Civil Procedure in affirming the grant of summary judgment in favor of the employer in a claim for overtime compensation under the Fair Labor Standards Act of 1938.

II. Whether employees seeking compensation under the Fair Labor Standards Act of 1938 for time spent "on call" while away from the employer's premises failed to come forward with specific, significantly probative evidence to support their claim under well-established Supreme Court precedent consistently applied by United States Courts of Appeals.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action was brought by 125 present and former maintenance employees ("Petitioners") of Respondent, the Ohio Turnpike Commission ("Turnpike"), pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. §201 *et seq.*, ("FLSA"). In their relevant claim, Petitioners seek to recover overtime compensation for time spent "on call" off the Turnpike's premises for unscheduled overtime necessitated by emergencies and weather conditions. Petitioners contend that as a result of the Turnpike's on-call policy, all hours which they spend at home, working at other jobs, driving to and from work, hunting, fishing, socializing, going to concerts, attending church, dating, dining out, and a myriad of other personal activities constitute "hours worked" within the meaning of the FLSA for which they should be compensated.

On Motion for Summary Judgment by the Turnpike, the trial Court found that the on-call time at issue was not compensable under the FLSA because during that time the employees could engage in a variety of activities designed for their personal benefit and not for the benefit of the Turnpike (Memorandum and Order of District Court at 14; *See* Petitioners' Petition for a Writ of Certiorari (hereinafter "Petition") at A49). The trial Court further found that "the requirement to be on-call had always been part of the [collective bargaining] agreement and thus, the employees have consented to it" (*Id.* at 16; Petition at A52).

On Petitioners' appeal, the Sixth Circuit, following the standard for compensability of on-call time clearly established by this Court and consistently followed by other courts, also ruled that the on-call time was not compensable under the FLSA. Specifically, the Court

ruled that the Turnpike's on-call policy was not "so onerous as to prevent [Petitioners] from effectively using their free time for personal pursuits." *Martin v. Ohio Turnpike Comm'n*, 968 F.2d 606, 611 (6th Cir. 1992). Because the record established that the Turnpike's on-call policy was not "especially burdensome" and because Petitioners had admitted that they participated in "numerous activities" while on call, thereby "preclud[ing] a finding that [Petitioners] are unable to use their time for their own pursuits," summary judgment in favor of the Turnpike was appropriate. *Id.* at 612. The Sixth Circuit then denied Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc*.

Petitioners now seek to overturn the Sixth Circuit Court of Appeals' affirmance of the District Court's grant of the Turnpike's Motion for Summary Judgment. Review by this Court, however, is unwarranted. The Court of Appeals below followed this Court's well-established precedent in determining the standard under which on-call time is compensable. The standard enunciated by the Sixth Circuit, moreover, is identical to the standard applied by all other United States Courts of Appeals which have spoken on the issue.

The Turnpike, a 241-mile limited access highway, employs approximately 300 maintenance workers, each assigned to one of eight maintenance and two Division Headquarters buildings located approximately 30 miles apart along the highway. Petitioners are former and present maintenance employees from all eight maintenance buildings and one of the Division Headquarters buildings.

During the relevant period, from January 1, 1986, to March 10, 1989, the maintenance employees' terms and conditions of employment were governed by a collective

bargaining agreement between the Turnpike and Local 1283 of the Laborers' International Union of North America. Maintenance employees work an eight-hour shift, five days per week, for which they are paid their straight time rate. Maintenance employees are also expected, as a condition of employment, to work scheduled and unscheduled overtime.

The collective bargaining agreement recognizes that the nature of the Turnpike's operation and weather conditions will require occasional emergency maintenance work and sets forth the agreement between the Turnpike and the union regarding overtime hours. In its pertinent parts, Section 3 provides: "Every effort will be made to keep overtime work to a minimum"; employees are entitled to pay for overtime work at a rate of one and one-half times their regular rate; all employees "shall work overtime when required"; overtime rosters shall be kept in conspicuous locations for the purpose of equalization of overtime; unless approved or excused, "refusal of or unavailability for overtime work shall be deemed sufficient cause for disciplinary action including dismissal"; and the disciplinary action taken will be determined by taking into consideration the reasons for the refusal, and if the employee is unavailable because of prior commitment such as a doctor or dentist appointment, no disciplinary action will be taken. The imposition of discipline under these provisions can be challenged under the grievance procedure contained in Section 17 of the collective bargaining agreement.

In addition to the above, maintenance employees are also informed of their specific responsibilities in: (1) safety meetings conducted by the foreman, which generally occur every six weeks to two months; (2) annual snow and ice control meetings conducted by the maintenance superintendent at each maintenance building; and, occasionally, (3) posted memoranda.

As stated previously, maintenance employees are expected to work scheduled and unscheduled overtime. Scheduled overtime may be required as a continuation of an employee's regular shift or at other times when the need for overtime work is apparent in advance. Unscheduled overtime is required when emergencies arise, such as a traffic accident, damage to Turnpike property (*e.g.*, a bridge, toll booth, median, etc.) or problems caused by weather conditions (usually snow and ice control). Since the Turnpike operates 24 hours a day, maintenance employees are required to be available to work unscheduled overtime to deal with emergencies as they arise.

Maintenance employees are not required to remain in any one place to "be available" for unscheduled overtime, but rather may make themselves available in any number of ways at the individual employee's option: leaving a telephone number(s) where he/she can be reached, calling the Turnpike to inquire if overtime work will be needed or using a pager. The Turnpike does not dictate how an employee chooses to make himself/herself available for overtime work and will accept collect calls from employees checking to see if they are needed for overtime work. Maintenance employees are always paid time and one half for hours worked in excess of 40 hours per week during which they render services on Turnpike property, regardless of whether those hours were scheduled or unscheduled overtime. Any employee who is released and then called back to Turnpike premises is paid time and a half for one hour of travel time and a minimum of three hours, even if he or she works less than three hours. In addition, employees who work on Saturday or Sunday are paid time and a half even if they did not work 40 hours during the week.

The procedure for "calling out" employees for unscheduled overtime varies according to the time of the year. In general, the maintenance building foreman tells the custodian how many and what types of employees will be needed for the work at hand. The custodian consults the overtime roster and begins calling the employees with the lowest number of overtime hours to date, in accordance with the equalization of overtime provisions in the collective bargaining agreement.[1] Three calls are made to the telephone number dictated by the employee, with the third call placed through the operator to ensure that the employee's telephone is working. Each call and the result thereof is recorded in the custodian's log. These calls are placed at intervals varying in length according to the urgency of the work to be done.

At all relevant times, the maintenance employees have been divided into A and B crews for overtime work. Under the A and B crew system, the maintenance employees (excluding custodians and section clerks) are evenly divided into separate crews designated as "A" or "B." These two crews then alternate periods of time during which they are responsible for overtime work. Winter A and B crews (October 1 to April 30) have been used by the Turnpike for many years. During the winter months, the maintenance employees work their regular shifts until a storm hits. At that time, the A and B crews begin alternating 12-hour shifts, with one crew working midnight to noon and the other crew working noon to midnight.[2] Within the crew that is "on," the low

[1] An exception to this general practice may be made if a particular skill is required and the lowest employees on the overtime roster do not possess that skill.

[2] For instance, at 10:00 a.m., all maintenance employees would be working their regular shift (8:00 a.m. to 4:00 p.m.). If a storm hits, the crew assigned to work the noon to midnight shift is sent home at noon to rest, attend to personal matters, or do whatever they may

(Footnote continued on following page.)

employees on the overtime roster for that crew are called to meet the Turnpike's overtime needs. The employees on the "off" crew are not called except in a dire emergency which requires more manpower than can be assembled from the "on" crew. When the storm abates, both crews return to their normal shifts.

Summer A and B crews operate differently than winter A and B crews. During the summer months, the employees are divided into A and B crews and alternate in two-week periods of "primary" and "secondary" responsibility for all overtime work. As with winter A and B crews, employees on the "off" crew are called only if the Turnpike's overtime needs cannot be met by the "on" crew.

Once an employee is contacted to report for overtime work, he is expected to arrive at the assigned time (immediately in the case of a present emergency or at a scheduled hour when, for instance, a storm is predicted). There is no designated period within which an employee must arrive at the Turnpike after receiving a call to report to work, since the employees may not be at home and are often located at varying distances from work. Depending on the urgency of the situation, the custodian may need to call another employee if the first employee contacted is too far away to be of assistance.

(Footnote continued from preceding page.)

wish until 4:00 p.m. These employees receive one hour of travel time pay at time and a half, even though the travel occurs during their regular work day. The balance of the maintenance employees, the midnight to noon crew, finishes its normal shift of 8:00 a.m. to 4:00 p.m. They are then relieved at 4:00 p.m. by the first crew, which works until midnight. At that time, the midnight to noon crew returns and 12-hour shifts continue until the emergency ends.

Employees may be excused from their responsibility to be available for overtime work by obtaining permission from their foreman in advance. Each request to be excused is evaluated individually, depending on the reason presented, fairness to other employees by allowing different employees to be excused and the foreman's responsibility to ensure that a crew can be assembled if an emergency arises. Maintenance employees are informed of the procedures for obtaining an excuse at snow and ice meetings and safety meetings.

Pursuant to the terms of the collective bargaining agreement, employees who are unavailable for overtime (those who cannot be reached) or who refuse to report for overtime work and who were not excused are subject to discipline. In 1984 and 1985, the discipline depended upon the number of times an employee was unavailable for or refused overtime in a 90-day period. After the first two instances of unavailability/refusal, the employee received a letter of reprimand. After the third instance, the employee received a second letter of reprimand or a suspension, depending on the facts of the individual case. Discipline for infractions beyond the third was also decided on an individual basis.

In July, 1986, the discipline policy for unavailability for/refusal of overtime changed to a five-step progression based upon the number of infractions in a one-year period: first infraction—verbal warning; second infraction—written reprimand; third infraction—one day suspension; fourth infraction—three day suspension; and fifth infraction—termination.[3] This modification

[3] Only two petitioners, plaintiffs John Gallagher and Mark Kinzer, have been terminated for five instances of unavailability/refusal of overtime. On January 9, 1987, Mr. Gallagher and Mr. Kinzer were asked to work overtime after their regular shift. Mr. Gallagher

(Footnote continued on following page.)

was effected at the behest of the Petitioners' union representative, who requested that the unavailability/refusal of overtime policy be made consistent with the tardiness policy. It was intended to standardize the disciplinary steps so the employees would know what discipline would be imposed for a particular infraction. As noted previously, the discipline imposed for an infraction of the overtime policy is subject to dispute by the maintenance employees through the grievance procedure. The evidence establishes that *no one has ever been terminated on the exclusive grounds of being unavailable under the on-call policy.* When grievances are filed over disciplinary actions imposed under the five-step unavailability for or refusal of overtime progression, the Turnpike reviews the individual circumstances and takes into account extenuating factors.

(Footnote continued from preceding page.)

refused to do so, stating he felt sick. Mr. Kinzer did not stay because he had ridden to work with Mr. Gallagher. Mr. Gallagher was given the opportunity to substantiate his claim that he was sick, but failed to do so. Both employees were then terminated because these refusals were the fifth instances of unavailability or refusal within one year. Both employees filed grievances and were subsequently reinstated without back pay as a result of settlement discussions between the Turnpike and the employees' representatives.

SUMMARY OF ARGUMENT

Petitioners have failed to identify a conflict in the United States Courts of Appeals, have raised no novel issue of law, and have advanced no argument for the extension of existing substantive law applicable to summary judgment and the compensability of on-call time.

The burden of the party opposing summary judgment has been clearly defined by this Court, and lower courts have had no difficulty applying it. Similarly, the issue of whether time spent by Petitioners on call is compensable under the FLSA is not an issue which warrants review by this Court. The Courts of Appeals have followed this Court's well-established standard for summary judgment and have consistently held that on-call time is compensable only when the employee cannot use the time effectively for his or her own purposes. Moreover, this Court has determined that this is a fact-intensive inquiry most appropriate for trial courts.

Petitioners are merely dissatisfied with the District Court's and Court of Appeals' application of the well-settled standards for summary judgment and the compensability of on-call time. There is no reason for this Court to revisit standards which it has clearly set forth, have been consistently followed, and were properly applied by the courts below.

REASONS FOR DENYING THE WRIT

I. This Court Has Clearly Established The Legal Standard For Summary Judgment Under Rule 56 Of The Federal Rules Of Civil Procedure: Summary Judgment Is Appropriate Where The Party Opposing Summary Judgment Fails To Come Forward With Specific, Significantly Probative Evidence Sufficient To Establish The Existence Of An Element Essential To That Party's Case And On Which That Party Bears The Burden Of Proof. The Sixth Circuit Court Of Appeals Properly Applied This Well-Settled Standard.

Petitioners misunderstand both the legal standard for summary judgment and their specific burden in opposing a motion for summary judgment. Contrary to Petitioners' contentions, the summary judgment standard has been clearly defined by this Court in a series of decisions construing Rule 56 of the Federal Rules of Civil Procedure and there is no need for this Court to revisit this issue.

Rule 56(c) of the Federal Rules of Civil Procedure in relevant part provides that summary judgment shall be rendered if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The application of this standard was explained in *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), where this Court ruled that:

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who *fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of*

> *proof at trial.* In such a situation, there can be "no genuine issue as to any material fact," since *a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.* The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof . . . (Emphasis added).

Indeed, in *Celotex, supra,* this Court made clear summary judgment is a *favored* method of case disposition in appropriate circumstances, emphasizing that "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and . . . it should be interpreted in a way that allows it to accomplish this purpose." 477 U.S. at 323-24. Noting that summary judgment had been authorized by the Federal Rules of Civil Procedure for almost 50 years, this Court stated:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. *Id.* at 327.

The "genuine issue as to any material fact" language of Rule 56 was then interpreted by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), decided the same day as *Celotex*. Recognizing that the very language of Rule 56 provides that the "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment," this Court held that the *substantive law* of the cause of action at issue "will identify which facts are material." 477 U.S. at 247-48 (emphasis in original). It explained:

> Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Factual disputes that are irrelevant or unnecessary will not be counted.* See generally 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, *it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Id.* at 248 (Emphasis added).

This Court went on to explain that a dispute about a material fact is "genuine" for purposes of Rule 56 "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* A court's function under Rule 56 is not to weigh the evidence and determine the truth of the matter, but to determine whether there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249. If the evidence is "merely colorable . . . or is not significantly probative," summary judgment is appropriate. *Id.* at 249-50.

In *Anderson, supra,* this Court made it very clear that the standard under Rule 56 is the same as the standard for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. That is, "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." 477 U.S. at 250, citing *Brady v. Southern R. Co.,* 320 U.S. 476, 88 L. Ed. 239, 64 S. Ct. 232 (1943). As emphasized by this Court in *Anderson,* this is a well-established standard:

> As the Court long ago said in *Improvement Co. v. Munson,* 14 Wall. 442, 448 (1872), and has several times repeated:
>
> > Nor are judges any longer required to submit a question to a jury merely because *some* evidence has been introduced by the party having the burden of proof, *unless the evidence is of such a character* that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there *is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it,* upon whom the *onus* of proof is imposed. (Footnotes omitted.)
>
> See also *Pleasants v. Fant,* 22 Wall. 116, 120-121 (1875); *Coughran v. Bigelow,* 164 U.S. 301, 307 (1896); *Pennsylvania R. Co. v. Chamberlain,* 288 U.S. 333, 343 (1933). 477 U.S. at 251 (Emphasis added).

See also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), decided shortly before *Anderson*

and *Celotex* (holding that even a complex antitrust case may be resolved at the summary judgment stage because there is no genuine issue for trial "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party").

Petitioners urge this Court to revisit these principles due to an alleged inconsistency between what the Petitioners call this Court's "verbiage" of (1) directing trial courts "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial," *Anderson, supra,* 477 U.S. at 249; and (2) requiring the courts to "bear in mind the actual quantum and quality of proof necessary to support liability" under the governing law. *Id.* at 254. Petition at 14. As shown above, however, there is no inconsistency between these directives: a court could not make a determination of the existence of a genuine issue of material fact without reference to the proof necessary to establish the elements under the substantive law. *Anderson* at 248. Petitioners offer no authority questioning the vitality of *Anderson*, nor do they advance a logical explanation for their misreading of *Anderson.* Although they seek a clarification of the *Anderson* decision, Petitioners fail to establish that lower courts have had any difficulty in applying its holding, nor that there is a split in the Courts of Appeals in construing the summary judgment standard.

Moreover, Petitioners ignore that this Court *has* recently further elaborated on the standard for summary judgment under Rule 56(c) and, instead of questioning the continuing vitality of its 1986 decisions, this Court has reiterated their holdings. Specifically, in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990), this Court reiterated its

holding in *Celotex, supra*, that under Rule 56 a moving party need not negate the elements of the nonmovant's case. Further, *Lujan* repudiates Petitioners' very contention: Resolving factual issues of controversy in favor of the non-moving party

> is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint. . . . Rule 56(e) provides that judgment "shall be entered" against the nonmoving party unless affidavits or other evidence "set forth specific facts showing there is a genuine issue for trial." The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. *Lujan*, 497 U.S. at _____, 110 S. Ct. at 3188, *citing Anderson, supra*, 477 U.S. at 249.

This Court went on to hold that the district court had properly entered summary judgment in favor of the defendants because the evidence offered by the plaintiffs failed, as a matter of law, to establish the essential elements of their case upon which they bear the burden of proof.

In sum, the essence of Petitioners' claim is that the Court of Appeals in this case made inappropriate "factual findings" and "improperly weighed" certain evidence offered in opposition to the Turnpike's Motion for Summary Judgment. Petition at 16-21. As more fully discussed below in Section II, Petitioners' contention is both legally and factually unfounded. The only determination made by the Court of Appeals was that there is no genuine issue as to a material fact within the meaning of *Celotex, supra, Anderson, supra* and *Matsushita, supra*. Concluding that Petitioners had failed to raise a genuine issue of material fact, the Court of Appeals properly affirmed the District Court's entry of summary judgment.

II. The Court Of Appeals Correctly Ruled That, Under Well-Established Supreme Court Precedent Consistently Applied By Courts Of Appeals, The Time Spent By Petitioners While On Call Is Not Compensable Under The FLSA Because During This Time They Engage In Activities Which Are Predominantly For Their Personal Benefit And Not For The Benefit Of Their Employer.

Petitioners seek to have this Court review an issue it settled long ago by adopting a standard for the compensability of on-call time which has since been consistently applied by the United States Courts of Appeals. That issue is whether the hours spent by Petitioners off the Turnpike's premises after their regular shift and during which they might be called to return for overtime work constitute "hours worked" within the meaning of the FLSA. Petitioners contend that, under the FLSA, they are entitled to time and a half for 16 hours per weekday, 24 hours per day on weekends or holidays, 365 days a year, excluding only those hours during which they are unavailable due to illness, vacation and other excusable reasons. The applicable law, as defined by this Court and all seven federal Courts of Appeals which have reached the issue, establishes that the Sixth Circuit Court of Appeals in this case properly applied the appropriate standard for compensability of on-call time, and that Petitioners' claim for overtime compensation need not be reviewed by this Court.

The overtime provision of the FLSA, Section 7(a)(1), 29 U.S.C. §207(a)(1), provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the

> production of goods for commerce, for a workweek longer than forty hours unless such employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §203(g) defines "employ" as "includ[ing] to suffer or permit to work."

In *Armour & Co. v. Wantock*, 323 U.S. 126, 89 L. Ed. 118, 65 S. Ct. 165 (1944), *reh'g denied*, 323 U.S. 818 (1945), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161 (1944), this Court long ago set forth the standard under which time spent by employees subject to being called to work by their employer is compensable under the FLSA. Specifically, this Court determined on-call time is compensable only if the time is spent predominantly for the employer's benefit, and not for the employee's. *Armour*, 323 U.S. at 133. At the same time, this Court wisely declined to announce a strict legal formula for determining the compensability of on-call time. Rather, this Court held that the determination "is a question dependent upon all the circumstances of the case." *Id.* In *Skidmore*, this Court then recognized that the issue of compensability

> involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all the surrounding circumstances. . . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was. 323 U.S. at 137.

In other words, the facts "may show that the employee was engaged to wait, or they may show that he waited to be engaged." *Skidmore* at 137.

In *Armour, supra*, members of the employer's private fire-fighting force were required to remain at the plant after their regularly scheduled nine-hour shift. During the remaining 15 hours of the day, the employees were free to cook, sleep and otherwise amuse themselves within the confines of the plant, but had to remain available to respond to any fire alarms or other emergencies. This Court held that just as an employer may hire employees to perform active labor, so may it hire employees to wait in order to ensure instant readiness to serve. 323 U.S. at 133. It affirmed the lower court's finding that the employees who were required to remain at the plant had been hired to work, that work consisting of waiting.

Addressing facts which were virtually identical to those in *Armour, supra*, this Court held in *Skidmore* that the trial court had erred in ruling that waiting time could never constitute "hours worked." 323 U.S. at 140. Relying on *Armour*, this Court remanded the employees' claim for determination by the trial court under the proper legal standard. *Id.*

The standard set forth in *Armour, supra*, and *Skidmore, supra*, has been further illustrated by the U.S. Department of Labor, which is charged with the enforcement and administration of the FLSA, and further defined by federal courts. The Secretary of Labor's Interpretive Bulletin No. 13, issued on January 1 1961, and published at 29 C.F.R. §785.17, states:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." *An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with*

> *company officials where he may be reached is not working while on call.* (Citations omitted) (Emphasis added).

The Interpretive Bulletin then continues: "Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." 29 C.F.R. §785.16. While not controlling, the Secretary of Labor's interpretations of the FLSA are entitled to great weight. *Skidmore* at 139-40.

Contrary to Petitioners' assertions, following *Skidmore, supra, Armour, supra,* and the Secretary of Labor's interpretations, the United States Courts of Appeals which have been presented with claims similar to Petitioners' claim have *consistently* ruled that such on-call hours are spent predominantly for the employees' benefit and, therefore, are not compensable under the FLSA.

For example, the Ninth Circuit has most recently spoken on the issue, utilizing a standard identical to that employed by the Sixth Circuit in this case. *Owens v. Local No. 169, Ass'n of Western Pulp and Paper Workers,* 971 F.2d 347 (9th Cir. 1992). The plaintiffs in *Owens* were mechanics at a pulp mill who worked regular daytime shifts. Because the mill operated 24 hours a day, the mechanics were expected to return to work to make emergency repairs on their off hours. Employees were subject to the call-in policy during all times they were not actively working, except for vacation periods. *Id.* at 349. Like the Turnpike, the mill developed rosters. Under the roster system, mechanics who had recently accepted a call-in were placed at the bottom of the week's call-in list. Mechanics who had not accepted a call-in for some time were most likely to be called. Mechanics were permitted to leave forwarding numbers, and those at the

top of the roster could request pagers. On average, mechanics accepted call-ins six times per year. Discipline was imposed upon mechanics who did not accept a fair share of their calls. *Id.*

The Ninth Circuit properly determined the standard for the compensability of on-call time is whether "the employee is unable to use the time effectively for his own purposes." *Owens, supra,* at 350. Under these facts, the Ninth Circuit ruled that judgment for the employer "is not only warranted, but compelled." *Id.* at 356.

Similarly, in *Birdwell v. City of Gadsden,* 970 F.2d 802 (11th Cir. 1992), the Eleventh Circuit held that a directed verdict should have been entered in favor of the employer. In *Birdwell,* plain clothes detectives claimed they should have been compensated for time spent on call. Specifically, the police force Captain had issued a directive requiring that the detectives leave a phone number where they could be contacted and that they be prepared to report for duty immediately when called. The detectives could not leave home unless they left a forwarding number or owned a beeper; detectives not owning beepers were severely limited in the activities in which they could participate; and the detectives could not drink alcohol. *Id.* at 808. The Eleventh Circuit concluded that the "on-call time was not spent predominantly for the employer's benefit" because several detectives had worked a second job while on call, none of the detectives claimed they could not use their time at home as they wished, they could leave home merely by leaving a forwarding number or purchasing a beeper, and they were infrequently called. *Id.* at 808, 810. The Court concluded: "They could do anything they normally did so long as they were able to respond to a call promptly and sober." *Id.* at 810.

Employing the same standard, the Fifth Circuit has consistently ruled in favor of the employer when the employees could effectively use the on-call time for their own purposes. For instance, in *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (1991), *cert. denied*, _____ U.S. _____, 112 S. Ct. 882 (1992), the *en banc* Fifth Circuit upheld a district court's entry of summary judgment in favor of the employer in a case involving a biomedical technician who was required to wear a pager to be available every day and night within 20 minutes to repair equipment. He was the only on-call employee and therefore had no reprieve from being on call. He was compensated for four hours each time he was called, but was not paid for other on-call time. 934 F.2d at 673, 679. Because the plaintiff's deposition testimony showed that during his on-call time he could watch television, shop at the supermarket and mall, and dine out, *id.* at 676, the Court determined that "the undisputed facts show that the on-call time is not working time." *Id.* at 675. *See also Halferty v. Pulse Drug Co.*, 864 F.2d 1185 (5th Cir. 1989) (on-call time not compensable where telephone dispatcher answered calls from her home for an ambulance service from 5:00 p.m. to 8:00 a.m. because she only actually answered a few calls per night and could pursue personal, social and business activities while on call, including eating, sleeping, watching television, entertaining guests, babysitting and doing laundry); *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369 (5th Cir. 1987) (on-call time not compensable where each evening one employee of a rural gas pipeline company satellite station was required to remain at home to hear an emergency alarm because the alarms were infrequent, on-call duty usually did not interfere with the normal activities in and around the home such as eating, sleeping, entertaining guests and

watching television, employees could trade their on-call responsibilities, and employees not on call could leave the site at will); and *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987) (time of offshore oil derrick barge employees not compensable because, even though during off hours employees were required to remain on the barge, the employees were free to sleep, eat, watch television, watch VCR movies, play ping pong or cards, and engage in a variety of other activities; summary judgment against the employees was therefore appropriate).

The Fourth Circuit has also reached the same conclusion on this issue. In *Kelly v. Hines-Rinaldi Funeral Home, Inc.*, 847 F.2d 147 (4th Cir. 1988), *cert. denied*, 493 U.S. 835 (1989), a housekeeper performed light cleaning duties at a funeral home between 9:00 p.m. and midnight and between 6:30 a.m. and 8:30 a.m. He slept on the premises between shifts and was required to answer the phone (about three times per month) and retrieve a corpse when necessary (about twice per month). In affirming the trial court's summary judgment in favor of the employer, the Fourth Circuit rested its decision on "practical considerations": an overwhelming amount of the night hours was available for the employee's uninterrupted use in his apartment, which was usually spent sleeping; the employee was very rarely called upon to perform duties during his off hours; and it was "not realistic to assume that [the employer] would employ someone for 69 hours per week, thereby incurring large overtime expense, to perform the tasks assigned to Kelly." 847 F.2d at 148. The Court in *Kelly* noted that the frequency of the interruptions as a significant factor had been acknowledged by several other Circuits in cases with similar facts.

Utilizing the same standard under three different factual circumstances, the Tenth Circuit has twice held on-call time noncompensable, and once held on-call time compensable. In *Boehm v. Kansas City Power & Light Co.*, 868 F.2d 1182 (10th Cir. 1989), linemen brought an action for all hours in excess of their regular 40-hour work week on the basis that the power company required them to be available to work at least once for every three times they were called. Employees who failed to respond as required were subject to a three-step progressive disciplinary policy culminating in discharge. If an employee missed a call-out because of extenuating circumstances, he could pursue an internal grievance procedure. The employees were permitted to leave an alternate phone number where they might be reached if they were not at their usual telephone number. Relying on its prior decision in *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10th Cir. 1988), the Tenth Circuit ruled that the district court should have granted a directed verdict as to all 200 plaintiffs' overtime claims:

> [W]e conclude that, although plaintiffs spent some time at home that they otherwise would not have spent because of the company's on-call policy, defendant's call-out policy as written and as applied was not so restrictive that a jury reasonably could conclude that the time was spent predominantly for the employer's benefit. Plaintiffs were free to leave the company's premises and did so. Plaintiffs were free to use their off-duty time as they wished, provided that they could be contacted and report for work one-third of the time that they were called. 868 F.2d at 1185.

In *Norton, supra*, the Tenth Circuit had held that truck drivers who were required to respond to telephone calls within 15 to 20 minutes or be subject to discipline were not "working" during the hours between calls

because the drivers spent the time between assignments at friends' homes, at church, at laundromats, at restaurants, at a local gymnasium and pursued hobbies such as working on guns or physical fitness. 839 F.2d at 655.

In contrast, while still employing the standard of whether the employees could effectively use the on-call time for their own purposes, the Tenth Circuit in *Renfro v. City of Emporia*, 948 F.2d 1529 (1991), *cert. dismissed*, _____ U.S. _____, 112 S. Ct. 1310 (1992), determined that firefighters who were subject to call on a rotating basis following a tour of duty were entitled to compensation. The Court found that the nature of the firefighters' on-call status differentiated the case from other on-call cases. Specifically, the Tenth Circuit upheld the district court's determination that the on-call time was compensable "primarily" because of the frequency which the firefighters were actually called. During each 24-hour on-call period, a firefighter could receive as many as 13 calls, and on average received 3 to 5 calls per period. 948 F.2d at 1537. Placing heavy emphasis on the frequency of the callbacks, the Court concluded that the firefighters could not use the time effectively for personal pursuits. *Id.* at 1535.

The Tenth Circuit decisions give a clear illustration of the principle that while different facts of discrete cases may produce different conclusions of law, the same set of facts has to lead to the same *legal* conclusion. *Bright, supra.* Thus, under a given set of undisputed facts, courts may enter summary judgment as a matter of law. *See, e.g., Owens, supra; Bright, supra; Rousseau, supra;* and *Kelly, supra.*

Thus, using the same legal standard, the Eighth Circuit in *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912 (1991), found that forestry service employees were

unable to use on-call time for their own purposes when they were required to monitor hand-held radios 24 hours per day during on-call periods and were required to respond immediately to emergencies. These requirements, the Court found, restricted the employees' travel, prevented them from participating in activities that would render them unable to hear the radio, forced them to concentrate on the radio at all times, and prevented them from going anywhere radio noise was unwelcome. *Id.* at 916-17.

Having analyzed this substantial body of law, the Sixth Circuit in the instant case agreed with all other Courts of Appeals and determined that on-call time "may be compensable if the restrictions imposed are so onerous as to prevent employees from effectively using the time for personal pursuits." *Martin, supra,* at 611. However, given the facts of this case, the Sixth Circuit determined that the Turnpike's on-call policy was simply not so restrictive as to prevent the Petitioners from making effective use of the time. *Id.* Specifically, the Plaintiffs admitted that while they were on call they: worked at second jobs, played golf, went swimming, performed housework, performed yardwork, entertained at home, watched television, engaged in sporting events outside their homes, visited friends and relatives, shopped, went to church, attended meetings of organizations, went to movies, dined out, and engaged in a myriad of other activities which courts have repeatedly found were for the employee's benefit, not the employer's. Thus, the Turnpike's on-call system was not "so distracting or cumbersome as to seriously inhibit personal activities." *Id.* at 611.

Petitioners' claims before this Court present no novel issue of law and are premised on the false proposition that disputed facts need not be material. First,

Petitioners attempt to draw distinctions between types of on-call cases, characterizing them as "respite" or "no respite" cases. Petition at 28-31. As the discussion *supra* indicates, there is no such dichotomy: the issue of compensability is wholly unrelated to whether the employee receive a period of "respite." Simply stated, the fact that an employee is on call one hour per week or all non-working hours in a week has no bearing on whether the *on-call time* can effectively be used for the employee's purposes. Moreover, courts have found on-call time compensable even where the employees had "respite," *e.g., Renfro, supra,* and have found on-call time non-compensable even where there was no "respite." *E.g., Owens, supra; Bright, supra.*

Second, Petitioners' claim that there is a split in the Circuits because the Fifth and Sixth Circuits have allegedly adopted a "total preclusion" rule is unfounded. As shown above, all Circuits which have reached this issue have used the *same* standard: whether the employees can effectively use the time spent on call for their own purposes. This is precisely what this Court ruled in *Armour, supra,* and *Skidmore, supra.* Ignoring this fact, Petitioners argue that the standard is "not whether the employee's time is pleasurably spent, but whether the employee can spend the time doing what the employee would choose to do *had he been free to chose* [sic]." Petition at 27 (emphasis in original). Petitioners erroneously rely upon *Skidmore,* 323 U.S. at 139, for this proposition. The language cited by Petitioners was not the ruling of this Court, but rather a recitation of the position of the Wage and Hour Administrator in its *amicus* brief. In *Skidmore,* this Court did not embrace the Administrator's position, but rather advised lower courts to accord the Administrator's opinions in individual cases such weight as is indicated based "upon

the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Thus, the Sixth Circuit in this case, consistent with the decisions of other courts, correctly rejected the standard urged by Petitioners. *Martin, supra*, at 611. *See also Norton, supra*, 839 F.2d at 654 (expressly rejecting the employees' claim that they should be compensated because there were other activities in which they might have engaged); and *Pilkenton v. Appalachian Regional Hospitals*, 336 F. Supp. 334, 338 (W.D. Va. 1971) ("the test is not whether an employee's leisure is curtailed at all, but rather whether it is so restricted that it is not spent primarily for the employee's benefit").

Third, Petitioners claim that the fact that they could have been disciplined for failing to respond to the Turnpike's call to come in to work has legal significance. Petition at 26, 31. Contrary to the Petitioners' contention, most litigated on-call policies provide for the imposition of discipline and this factor has made no difference, *i.e.*, is not a *material* issue. *See, e.g., Owens, supra*, at 349; *Cross, supra*, at 914; *Renfro, supra*, at 1531; *Norton, supra*, at 655; and *Boehm, supra*, at 1183. Petitioners have failed to cite any authority in support of their proposition that the employer's imposition of discipline is a relevant inquiry in determining compensability of overtime. Indeed, none exists. Moreover, maintenance employees may avoid discipline by various means, in addition to taking vacation or when ill: (a) employees may be excused from the responsibility to be available for overtime work by obtaining permission from their foreman in advance; (b) an employee may inform the custodian at any time that he

or she will not be at the phone number previously provided to the custodian and supply a new number for the custodian to call; (c) if the employee does not give the custodian an alternative phone number, he or she can call the custodian to determine whether his or her services would be needed; and (d) employees are permitted to carry a pager. In addition, employees who are on an "off" crew but are called in, as in an extreme emergency, are not subject to discipline even if they are unavailable or refuse to respond to the call.

Fourth, the Petitioners claim that it was improper for the Court below to grant summary judgment because there remained a factual dispute as to whether maintenance employees who carried a pager in order to be called in to work did so at their own risk. Petitioners claim that this issue has a bearing on "the extent of the burden on the employees [sic] private lives by the on-call policy . . ." Petition at 18. This ignores the specific finding of the Court of Appeals that "[t]he fact that employees bore the risk of using pagers does not amount to an interference with the employees' ability to use their free time." *Martin, supra,* at 612. Since the Court did consider the risk of a pager's malfunctioning, Petitioners' contentions on this point are frivolous.

Fifth, Petitioners contend there is a factual issue as to how frequently they were called back to work. In support of their contention, Petitioners refer to the affidavits of two employees, one claiming he was called back "four or five times per week," the other claiming he was called back "often." Petition at 19. Petitioners fail to recognize their burden in opposing a motion for summary judgment. These two allegations, out of a record of about a thousand pages of evidence adduced by Petitioners, do not constitute *sufficient evidence* upon

which a reasonable jury could return a verdict for Petitioners. *See Anderson, supra,* at 249-50; *Lujan, supra,* 497 U.S. at _____, 110 S. Ct. at 3188.

Finally, Petitioners contend that summary judgment was improper because they created an issue of fact concerning the allowed response time when they were called by the Turnpike. Petitioners once again have seized upon a matter that is wholly inconsequential to the legal test for compensability of on-call time. Response time is simply not a *material* fact preventing summary judgment.

As the Fourth, Fifth, Sixth, Ninth and Tenth Circuits have ruled, the determination of whether time spent on call under a particular arrangement is compensable is a fact-intensive inquiry appropriate for disposition by summary judgment. This is totally consistent with this Court's statement in *Skidmore, supra,* that "[f]acts may show that the employee was engaged to wait, or they may show that he waited to be engaged." 323 U.S. at 137. In *Skidmore,* this Court remanded the case to the district court for a factual determination of whether the facts established compensability under the standard just announced. *Id.* at 140. The District Court in this case has already made that determination under the appropriate standard. There is thus no reason to grant the Petition for a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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